

EDWIN K. SLAUGHTER, et al.,)	2:08-CV-01223-RCJ-(GWF)
Plaintiffs,)	
v.)	ORDER
UPONOR, INC., et al.,)	
Defendants.)	

Now before the Court is Plaintiff's Motion for Re-Taxation of Costs filed on June 4, 2010 (#432). Hughes filed an opposition on June 17, 2010 (#435) and Plaintiff filed a reply on June 28, 2010 (#446); Interstate filed an opposition on June 21, 2010 (#438); United filed an

1 opposition on June 21, 2010 (#441); and Ferguson filed an opposition on June 22, 2010
 2 (#443). Plaintiff subsequently filed a reply to these oppositions on July 1, 2010 (#447). The
 3 Court heard oral argument on August 13, 2010. The Court now issues the following order.
 4 IT IS HEREBY ORDERED that Plaintiff's Motion for Re-Taxation of Costs (#432) is GRANTED
 5 IN PART AND DENIED IN PART as follows:

PARTY	COSTS BEFORE RETAX	COSTS AFTER RETAX
United & Ferguson	\$21,551.16	\$14,554.77
Hughes	\$5,898.05	\$5,304.37
Interstate	\$17,178.44	\$15,469.00
United	\$70,122.41	\$10,911.29

12 I. BACKGROUND

13 On July 28, 2008, Plaintiffs filed the present cause of action, on behalf of themselves
 14 and all others similarly situated, in the District Court for Clark County, Nevada. (Pet. for
 15 Removal (#1), Ex. 1). Defendants are engaged in the business of designing, developing,
 16 manufacturing, distributing, marketing, selling, and/or installing the Wirsbo PEX plumbing
 17 system, Wirsbo brass fittings, and other plumbing materials. (*Id.* at ¶¶ 5–11).

18 Plaintiffs alleged that the Wirsbo brass fittings installed in certain residences
 19 throughout Clark County, Nevada were defective. The Wirsbo fittings allegedly reacted with
 20 the water in Clark County in such a manner as to cause a chemical reaction known as
 21 dezincification. As a result of dezincification, Plaintiffs further alleged that zinc leached out
 22 of the Wirsbo brass fittings, which impaired residences' plumbing systems and homes. (*Id.*
 23 at ¶¶ 22–33). Plaintiffs filed suit under the following theories of liability: (1) product liability;
 24 (2) strict liability; (3) breach of express warranty; (4) breach of implied warranty; (5) breach
 25 of warranty of merchantability; and (6) negligence. (*Id.* at ¶¶ 34–93).

26 On September 15, 2008, Defendants removed the lawsuit from state court to federal
 27 court pursuant to the Class Action Fairness Act ("CAFA") because: (i) the amount in
 28 controversy exceeded \$5,000,000; (ii) there was diversity of citizenship between Plaintiffs and

1 more than one Defendant; and (iii) Plaintiffs claimed more than 100 class members. (Pet. for
 2 Removal (#1)). On December 7, 2009, Plaintiff filed a Motion for Voluntary Dismissal (#285).
 3 The Court granted Plaintiff's motion, dismissing the entire action with prejudice. (See Order
 4 (#349)).

5 On February 10, the following parties each filed a motion for attorneys' fees: Ferguson
 6 (#350); United (#351); Hughes (#352); RCR (#353); and Interstate (#354). The Court heard
 7 oral arguments on May 10, 2010, and ordered 100 percent of costs and one-fifth of fees.
 8 (Mins. of Proceedings (#417)).

9 II. ANALYSIS

10 "Unless a federal statute, these rules, or a court order provides otherwise, costs—other
 11 than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1); see
 12 also LR 54-1(a) ("Unless otherwise ordered by the court, the prevailing party shall be entitled
 13 to reasonable costs.").

14 Every bill of costs and disbursements shall be verified and distinctly set forth
 15 each item so that its nature can be readily understood. The bill of costs shall
 16 state that the items are correct and that the services and disbursements have
 17 been actually and necessarily provided and made. An itemization and, where
 18 available, documentation of requested costs in all categories must be attached
 19 to the bill of costs.

20 Local Rule 54-1(b). The party seeking costs bears the burden of proving the amount of
 21 compensable costs. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1248–49 (10th Cir. 2002).

22 A. Plaintiffs Did Not Waive Their Right to Object

23 Defendants objected to Plaintiffs' Motion for Re-Taxation of Costs (#432) on the basis
 24 that Plaintiffs waived the right to object because new issues cannot be raised for the first time
 25 in a reply brief, and Plaintiffs had failed to object to Defendants' initial bill of costs. (See
 26 Hughes Opp'n (#435) at 2:9–20; Interstate Opp'n (#438) at 2:9–15; United Opp'n (#442) at
 27 6:14–20). The argument revolves around the concept that a party must timely respond to
 28 pleadings with any and all arguments available to the party or otherwise have them waived.
 See, e.g., *Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008) ("Arguments raised
 for the first time in petitioner's reply brief are deemed waived."). Although Plaintiffs did not go

1 through a line-by-line recitation of the disputed claims in objecting to the original initial bill of
 2 costs during oral arguments, Plaintiffs' did generally refer to failures by the parties to conform
 3 the bill of costs to the applicable federal and local rules. (See Mins. of Proceedings (#416)
 4 at 32:14–41:2). The Court's request that the parties file an amended bill of costs was based
 5 in part upon these objections. (See Mins. of Proceedings (#416) at 61:11–21). Hence,
 6 Plaintiffs are not raising new issues for the first time in a reply brief, and Plaintiffs did not fail
 7 to object to Defendants' initial bill of costs.

8 **B. Ferguson and United**

9 Ferguson and United argue that the \$186.00 cost for obtaining a transcript of the
 10 pretrial proceedings is taxable because the transcripts were used in support of pleadings they
 11 filed in this litigation. (See Ferguson and United Opp'n (#443) at 4:13–19). However,
 12 "[t]ranscripts of pretrial, trial, and post-trial proceedings are not taxable unless either
 13 requested by the court or prepared pursuant to stipulation approved by the court." LR 54-3.
 14 As these transcripts have not been requested by the Court or prepared pursuant to a
 15 stipulation approved by the Court, the \$186.00 transcript cost is not taxable.

16 "The cost of a deposition transcript (either the original or a copy, but not both) is
 17 taxable whether taken solely for discovery or for use at trial." LR 54-4. Ferguson and United
 18 argue that the \$250.00 cost for obtaining a videotape transcript of Richard Houle's deposition
 19 after obtaining a written transcript of the same deposition is taxable because both transcripts
 20 are needed to have "one complete copy." (See Ferguson and United Opp'n (#443) at
 21 4:11–12). The Ninth Circuit has not made a clear determination of whether videotape
 22 transcripts and written depositions can both be taxed. The remaining circuits are divided on
 23 this question. (See, e.g., *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 449 (4th Cir. 1999)
 24 (awarding only transcription cost where there was no showing that videotaping was
 25 necessary); *Tilton v. Capital Cities*, 115 F.3d 1471, 1478 (9th Cir. 1997) (permitting taxation
 26 of videotape transcript if "necessarily obtained for use in the case"). Nonetheless, in *Nicolaus*
 27 *v. West Side Transport, Inc.*, the District Court of Nevada held "the costs of videotaping and
 28 transcribing a deposition [both] taxable." 185 F.R.D. 608, 612 n. 2 (D. Nev. 1999). Further,

videotape transcripts and written transcripts each have distinct benefits. Videotape may provide insight into the demeanor and bearing of a witness, while a written transcript ensures consistency in the written record regarding statements made during the deposition. As such, the \$250.00 cost for obtaining the video transcript are taxable.

The \$6,810.39 regarding the copying and/or exemplification costs claimed by Ferguson and United are not taxable under 28 U.S.C. § 1920 as interpreted by Local Rules of the United States District Court of the District of Nevada.

The cost of copies of an exhibit necessarily attached to a document required to be filed and served is taxable. Cost of one (1) copy of a document is taxable when the copy is admitted into evidence in lieu of an original because the original is either not available or is not introduced at the request of opposing counsel. The cost of copies submitted in lieu of originals because of the convenience of offering counsel or counsel's client is not taxable. The cost of reproducing copies of motions, pleadings, notices and other routine case papers is not allowable. The cost of copies obtained for counsel's own use is not taxable.

LR 54-6(a). While Ferguson and United cite to *Haagen-Dazs Co., Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, 920 F.2d 587 (9th Cir. 1990), and *Disc Golf Assn., Inc. v. Champion Discs, Inc.*, 158 F.3d 1002 (9th Cir. 1998), neither of these cases are applicable to the current case. *Haagen-Dazs Co., Inc.* and *Double Rainbow Gourmet Ice Creams, Inc.* apply Local Rule 54-3 of the United States District Court for the Northern District of California, which contains a broader definition of what copying and/or exemplification costs are taxable. The local rules applicable to this Court narrow the allowed taxable items under 28 U.S.C. § 1920 to "copies of exhibits necessarily attached to a document to be filed and served." LR 54-6(a). As such, the \$6,810.39 amount is nontaxable.

Therefore, United & Ferguson's costs shall be retaxed from \$21,551.16 to \$14,554.77. (See United & Ferguson's Amended Bill of Costs (#418)).

C. Hughes

Plaintiffs objection to Hughes requested a reduction of the Amended Bill of Costs (#419) from \$5,898.05 to \$5,304.37. (See Pl.'s Mot. (#432) at 9:7–11:10). Hughes conceded the error and stated in its reply that it was submitting a corrected Bill of Costs in the amount of \$5,304.37, but appears to have made a clerical error by using the original amount of

1 \$5,898.05 when adding it to the total amount of fees and costs to be awarded. (See Hughes
2 Amended Order (#436) at 7:10–13).

3 Therefore, Hughes' costs shall be retaxed from \$5,898.05 to \$5,304.37. (See Hughes'
4 Bill of Costs (#419)).

5 **D. Interstate**

6 The objections related to Interstate are based on: (1) costs related to transcripts of
7 pretrial proceedings not requested by the court or prepared pursuant to stipulation by the
8 court; (2) obtaining multiple transcriptions of the same deposition; and (3) copying and/or
9 exemplification of documents that were not filed and served or admitted into evidence in this
10 litigation. Interstate did not address Plaintiffs' claims directly, but rather concluded without
11 support that the costs were taxable and that the district court has the discretion to interpret
12 what constitutes taxable costs. (Interstate Opp'n (#438) at 3:1–4:3).

13 With respect to the first objection, "[t]ranscripts of pretrial, trial, and post-trial
14 proceedings are not taxable unless either requested by the court or prepared pursuant to
15 stipulation approved by the court." LR 54-3. As Interstate has not shown that the transcripts
16 of the hearings were requested by the Court or prepared pursuant to stipulation approved by
17 the Court, the costs of obtaining hearing transcripts should not be taxable. The costs at issue
18 are \$49.50, in connection with a hearing conducted on July 16, 2009, and \$15.30, in
19 connection with a hearing conducted on June 26, 2009, for a total of \$64.80. (See Pl.'s Mot.
20 (#432) at 13:10–14).

21 However, Plaintiffs objection regarding obtaining "multiple" transcripts of the same
22 deposition merely refer to Interstate's practice of obtaining both video and written transcript
23 formats for depositions. "The cost of a deposition transcript (either the original or a copy, but
24 not both) is taxable whether taken solely for discovery or for use at trial." LR 54-4. This
25 mirrors the argument made in objection to United and Ferguson's practice of doing the same.
26 As such, the same reasoning applies and the costs associated with the deposition transcripts

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1 that are objected to here are taxable. The costs objected to here and appropriately taxable
2 relate to \$440.00 for the video transcripts of the deposition of Alan Carducci. (See Pl.'s Mot.
3 (#432) at 13:15–18).

4 Interstate acknowledges that the amount of \$1,644.64 was “mistakenly identified” as
5 docket fees and should have been listed as fees for copying and/or exemplification.
6 (Interstate Opp’n (#438) at 3:1–3:6). However, Interstate has failed to show whether this cost
7 related to documents that were filed and served or admitted into evidence in this litigation
8 under LR 54-6(a). Furthermore, LR 54-7 states that “[t]he cost of enlargements greater than
9 8" x 10", models, summaries, computations, and statistical comparisons is not taxable except
10 by prior order of the court.” LR 54-7. Interstate’s invoices indicate that at least some of this
11 cost was attributable to oversize color enlargements. (See, e.g., Invoice No. 65579, attached
12 to Interstate’s Amended Bill of Costs (#422) at 57). Hence, the \$1,644.64 is non-taxable.

13 Therefore, Interstate’s costs shall be retaxed from \$17,178.44 to \$15,469.00. (See
14 Interstate’s Amended Bill of Costs (#422)).

15 **E. United**

16 Plaintiffs argue that United’s Bill of Costs (#425) should not be awarded in its entirety.
17 In making this argument, Plaintiffs first asserts that United failed to file its Bill of Costs in a
18 timely manner pursuant to LR 54-1. Although the parties base this dispute in part upon
19 whether a final judgment or decree took place that triggered the ten day requirement of LR
20 54-1, the Court need not address this issue because the Court specifically provided for a
21 briefing schedule. (See Order (#349) at 1:20–21). The ten-day requirement does not apply
22 when otherwise ordered by the court. See LR 54-1.

23 Furthermore, Plaintiffs admit that United had previously disclosed at least some of its
24 fees and costs. (See Pl.’s Reply (#447) at 10:11–12:6). Hence, United’s Bill of Costs can be
25 interpreted as a re-filing of its originally disclosed costs. Contrary to Plaintiffs’ argument to
26 the contrary, the Court furthermore explicitly acknowledged the possibility that a re-filing would
27 result in larger amounts of fees and costs, and that the calculation of one hundred percent

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1 costs and one-fifth fees would apply regardless. (See Mins. of Proceedings (#416) at
2 64:12–66:8).

3 For the same reasons as addressed with respect to the costs and fees discussed
4 above, the \$10,911.28 in deposition costs is taxable and the \$59,211.12 in transcription costs
5 is nontaxable pursuant to the local rules. See LR 54-4, LR 54-6 and LR 54-7. The
6 \$10,911.28 in deposition costs again refer to the argument regarding alleged duplicative fees
7 attributable to obtaining both videotape transcripts and written transcripts of the same
8 depositions. As was established in regard to Interstate as well as Ferguson and United, these
9 fees are taxable. The \$59,211.12 in transcription costs for copy/exemplification are
10 nontaxable pursuant to the same arguments made in Interstate as well as Ferguson and
11 United. As there was no evidence that these copies were made in lieu of producing originals
12 or was otherwise taxable under LR 54-6(a), the \$59,211.12 is nontaxable.

13 Therefore, United's costs shall be retaxed from \$70,122.41 to \$10,911.29. (See United
14 Bill of Costs (#425)).

15 III. CONCLUSION

16 Accordingly, IT IS ORDERED that Plaintiff's Motion for Re-Taxation of Costs (#432) is
17 GRANTED IN PART AND DENIED IN PART.

18 IT IS FURTHER ORDERED that Ferguson Enterprises, Inc. and United Plumbing, LLC
19 are entitled to \$14,554.77 in taxable costs.

20 IT IS FURTHER ORDERED that Hughes Water Sewer, LP is entitled to \$5,304.37 in
21 taxable costs.

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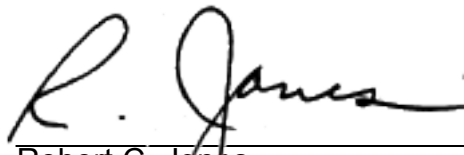
1 IT IS FURTHER ORDERED that Interstate Plumbing & Air Conditioning is entitled to
2 \$15,469.00 in taxable costs.

3 IT IS FURTHER ORDERED that United Plumbing, LLC is entitled to \$10,911.29 in
4 taxable costs.

5 The Clerk of the Court shall retax costs accordingly.

6 IT IS SO ORDERED.

7 DATED: This 20th day of September, 2010.

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11 Robert C. Jones
12 UNITED STATES DISTRICT JUDGE
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